**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-0137**

Loren J. Zutz, et al.,
Appellants,

vs.

John Nelson, et al.,
Respondents.

**Filed August 14, 2017**
**Reversed**
**Johnson, Judge**

Marshall County District Court
File No. 45-CV-08-59

Paul A. Sortland, Sortland Law Office, Minneapolis, Minnesota (for appellants)

Sarah E. Bushnell, Colin S. Seaborg, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Toussaint, Judge.*

**U N P U B L I S H E D  O P I N I O N**

**JOHNSON**, Judge

Appellants argue that the district court erred by rejecting their argument that the so-called anti-SLAPP statute is unconstitutional as applied to their claims against respondents.

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

We conclude that appellants did not waive their constitutional challenge by not asserting it at an earlier stage of the case. We also conclude that the anti-SLAPP statute is unconstitutional as applied to appellants' claims against respondents. Therefore, we reverse.

## FACTS

This case was commenced a decade ago, in August 2007. Loren Zutz and Elden Elseth alleged that John Nelson and Arlyn Stroble defamed them. Zutz and Elseth sought damages and requested a declaration that they had not violated Minnesota law. The underlying facts have been thoroughly recited in prior appellate opinions and need not be repeated here. *See Zutz v. Nelson*, No. A08-1764, 2009 WL 1752139, at *1 (Minn. App. June 23, 2009) (*Zutz I*); *Zutz v. Nelson*, 788 N.W.2d 58, 59-61 (Minn. 2010) (*Zutz II*); *Zutz v. Nelson*, No. A14-0573, 2014 WL 7344058, at *1-3 (Minn. App. Dec. 29, 2014) (*Zutz III*), *review denied* (Minn. Mar. 25, 2015).

In March 2008, Nelson and Stroble moved for judgment on the pleadings. *See* Minn. R. Civ. P. 12.03. They made six arguments, including an argument that they are protected by an absolute legislative privilege and an argument that they are immune from liability under the anti-Strategic Litigation Against Public Participation (anti-SLAPP) statute, Minn. Stat. §§ 554.01-.05 (2006).[1] The district court granted the motion on the ground that Nelson and Stroble are protected by an absolute legislative privilege. The

[1]The statute is concerned with so-called "SLAPP suits," which typically are intended "to intimidate opponents' exercise of rights of petitioning and speech." *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 228 (Minn. 2014) (*Leiendecker II*).

district court did not consider Nelson and Stroble's argument based on the anti-SLAPP statute. On appeal, this court affirmed. *Zutz I*, 2009 WL 1752139, at *2. But on further review, the supreme court reversed on the ground that Nelson and Stroble are not protected by an absolute legislative privilege but, rather, by a qualified legislative privilege. *Zutz II*, 788 N.W.2d at 66. The supreme court remanded the case to the district court for further proceedings. *Id.*

In August 2013, Nelson and Stroble moved for summary judgment. *See* Minn. R. Civ. P. 56.03. They made five arguments, including an argument under the anti-SLAPP statute. In February 2014, the district court granted the motion for two reasons: (1) Nelson and Stroble's allegedly tortious statements were true, and (2) Zutz and Elseth did not submit sufficient evidence that Nelson and Stroble acted with actual malice. The district court considered Nelson and Stroble's argument under the anti-SLAPP statute but concluded that Nelson and Stroble are not entitled to anti-SLAPP immunity because they are protected by a qualified legislative privilege.

Zutz and Elseth filed a notice of appeal, and Nelson and Stroble filed a notice of related appeal. In December 2014, this court affirmed with respect to the issue of actual malice. *Zutz III*, 2014 WL 7344058, at *3-5. But we reversed with respect to the anti-SLAPP statute. *Id.* at *5-7. We reasoned that Nelson and Stroble's qualified legislative privilege does not preclude them from obtaining anti-SLAPP immunity, and we noted that the anti-SLAPP statute allows for the recovery of attorney fees and costs. *Id.* In discussing the anti-SLAPP statute, we applied the supreme court's opinion in *Leiendecker II*, which was issued while the *Zutz III* appeal was pending. *Zutz III*, 2014 WL 7344058, at *5. In

*Leiendecker II*, the supreme court held that after a defendant asserting an anti-SLAPP motion makes "a threshold showing that the underlying claim materially relates to an act of the moving party that involves public participation," the district court must grant the anti-SLAPP motion unless the responding party shows by clear and convincing evidence that the defendant is not entitled to anti-SLAPP immunity. 848 N.W.2d at 229 (quotations omitted). In *Zutz III*, we remanded this case to the district court with instructions to apply *Leiendecker II* and to determine whether Zutz and Elseth had produced clear and convincing evidence that Nelson and Stroble's statements were tortious. 2014 WL 7344058, at *7.

On remand, the district court ordered the parties to submit supplemental memoranda concerning *Leiendecker II*. Zutz and Elseth argued, among other things, that the anti-SLAPP statute is unconstitutional as applied because the statute would deprive them of their right to a jury trial on any valid claims. In response, Nelson and Stroble argued, among other things, that Zutz and Elseth waived their constitutional challenge by not asserting it at an earlier stage of the case. The district court ruled that Zutz and Elseth waived their constitutional challenge by not asserting it earlier. The district court applied *Leiendecker II* and concluded that "Zutz and Elseth have failed to present clear and convincing evidence that the statements made by Stroble and Nelson are not entitled to immunity." Thus, the district court granted Nelson and Stroble's motion and concluded that they are "entitled to recover their reasonable costs and attorney fees, as provided by statute." *See* Minn. Stat. § 554.04, subd. 1. In November 2016, the district court issued an

order in which it awarded Nelson and Stroble a total of $20,501.14 in attorney fees and costs. The court administrator entered judgment. Zutz and Elseth appeal.

## D E C I S I O N

Zutz and Elseth argue that the district court erred by ruling that they waived their constitutional challenge to the anti-SLAPP statute and by not ruling that the statute is unconstitutional as applied on the ground that it would deny them their right to a jury trial.

### A.

We first consider Zutz and Elseth's argument that the district court erred by ruling that they waived their constitutional challenge to the anti-SLAPP statute. If the underlying facts are not in dispute, this court applies a *de novo* standard of review to the issue of waiver. *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 631 (Minn. 2017) (*Leiendecker III*).

The district court determined that Zutz and Elseth waived their constitutional challenge to the anti-SLAPP statute for the following reasons:

> [T]he Court of Appeals determined that Nelson and Stroble had made a threshold showing that the anti-SLAPP law applied to their statements and remanded the case to the district court. If the district court was now allowed to find the anti-SLAPP statute unconstitutional, it would be disregarding the specific remand instructions given to it by the appellate court. If Zutz and Elseth wanted to challenge the constitutionality of the anti-SLAPP law, they should have raised the issue when Nelson and Stroble filed their anti-SLAPP motion because the constitutional issue now raised by Zutz and Elseth was inextricably linked to Nelson and Stroble's claim that the statute applied to their statements.

While this appeal was pending, the supreme court issued an opinion in a different case that addressed the same issue. *See Leiendecker III*, 895 N.W.2d at 631-33. The *Leiendecker* defendants moved to dismiss a lawsuit for numerous reasons, including anti-SLAPP immunity. *Leiendecker II*, 848 N.W.2d at 227. In an earlier appeal, the supreme court clarified the procedures that apply to an anti-SLAPP motion and remanded the case to the district court. *Id.* at 228-33. On remand, the *Leiendecker* plaintiffs challenged the constitutionality of the anti-SLAPP statute for the first time. *See Leiendecker III*, 895 N.W.2d at 630. In the subsequent appeal, the supreme court considered whether the plaintiffs had waived their constitutional challenge by not asserting it earlier. *Id.* at 631. The supreme court held that the plaintiffs had not waived their constitutional challenge because it was predicated on the supreme court's interpretation of the anti-SLAPP statute in the prior appeal. *Id.* at 633. The supreme court reasoned that the plaintiffs' constitutional argument "was not ripe until the case was remanded to the district court and, therefore, could not have been waived at an earlier point in time." *Id.* at 631.

In this case, we asked the parties to submit supplemental briefs on the applicability of *Leiendecker III*. Because the procedural history of this case is similar to the procedural history of the *Leiendecker* case, Zutz and Elseth's argument is similar to the argument of the *Leiendecker* plaintiffs. Before the supreme court issued its opinion in *Leiendecker II* on June 25, 2014, the applicable caselaw concerning anti-SLAPP immunity was considerably different from what it is today. In June 2013, this court held that a plaintiff responding to a motion under the anti-SLAPP statute "need not produce actual evidence to meet its burden." *Leiendecker v. Asian Women United of Minnesota*, 834 N.W.2d 741, 751

(Minn. App. 2013) (*Leiendecker I*), *rev'd*, 848 N.W.2d 224 (Minn. 2014). Accordingly, when they responded to Nelson and Stroble's anti-SLAPP motion in October 2013, Zutz and Elseth reasonably could have believed that their allegations of tortious conduct would be sufficient to defeat the anti-SLAPP motion. In short, the unconstitutionality of the anti-SLAPP statute was not yet apparent. Zutz and Elseth's constitutional challenge to the anti-SLAPP statute did not become viable until June 25, 2014, when the supreme court interpreted the anti-SLAPP statute in *Leiendecker II*. *See* 848 N.W.2d at 230. In discussing the issue of waiver in *Leiendecker III*, the supreme court stated, "the . . . current [constitutional] challenge is entirely based on our new interpretation of the law, which did not exist when we first reviewed this appeal." 895 N.W.2d at 632. The same is true in this case. Nelson and Stroble have provided no valid reason to distinguish this case from the waiver analysis in *Leiendecker III*.

Thus, the district court erred by ruling that Zutz and Elseth waived their constitutional challenge to the anti-SLAPP statute by not asserting it at an earlier stage of the case.

**B.**

We next consider Zutz and Elseth's argument that the statute is unconstitutional on the ground that it would deny them their right to a trial by jury if they had claims that warranted a trial. We are mindful that, in light of this court's most recent prior opinion, Zutz and Elseth do not have any pending claims that warrant a trial. *See Zutz III*, 2014 WL 7344058, at *7. The constitutionality of the anti-SLAPP statute as applied to Zutz and Elseth nonetheless is a live issue because, in *Zutz III*, we reversed that part of the district

court's February 2014 ruling in which it rejected Nelson and Stroble's argument for anti-SLAPP immunity and remanded the case to the district court for further consideration of Nelson and Stroble's anti-SLAPP motion. *Id.* Whether Nelson and Stroble are entitled to anti-SLAPP immunity is consequential only insofar as Nelson and Stroble seek an award of attorney fees and costs under the anti-SLAPP statute. This court applies a *de novo* standard of review to the question whether a statute is unconstitutional. *Leiendecker III*, 895 N.W.2d at 634-35.

In *Leiendecker III*, the supreme court held that the anti-SLAPP statute deprived the plaintiffs of their constitutional right to a jury trial. *Id.* at 633-37. The supreme court reasoned that section 554.02, subdivision 2, "unconstitutionally instructs district courts to usurp the role of the jury by making pretrial factual findings that can . . . result in the complete dismissal of the underlying action," even though "the role of resolving disputed facts belongs to the jury, not the court." *Id.* at 635. The supreme court also reasoned that section 554.02, subdivision 2, is unconstitutional because it "require[s] the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence)." *Id.* at 636. Thus, the supreme court concluded that the anti-SLAPP statute was unconstitutional as applied. *Id.* at 638.

Zutz and Elseth argue that the anti-SLAPP statute would affect them in essentially the same manner in which it affected the *Leiendecker* plaintiffs. A straightforward application of *Leiendecker III* to this case leads to the same conclusion: the anti-SLAPP statute is unconstitutional. *See id.*

Nelson and Stroble contend that this case is distinguishable from *Leiendecker III* on the ground that the anti-SLAPP statute was not the sole reason that the district court granted summary judgment in their favor. In essence, they argue that the anti-SLAPP statute did not actually violate Zutz and Elseth's right to a jury trial because Zutz and Elseth would not have had a right to a jury trial even if Nelson and Stroble had not invoked the anti-SLAPP statute. As noted above, our review of the anti-SLAPP issue was prompted by the notice of related appeal that Nelson and Stroble filed after the district court's February 2014 decision. Nelson and Stroble had prevailed in the district court for two reasons, but they elected to pursue a cross-appeal to establish a third reason for a judgment in their favor, presumably because a favorable ruling under the anti-SLAPP statute would allow them to recover attorney fees and costs. We granted them appellate relief on their cross-appeal and remanded to the district court for further consideration of their anti-SLAPP argument. *See Zutz III*, 2014 WL 7344058 at *7. The limited purpose of the remand was to determine whether Nelson and Stroble are entitled to anti-SLAPP immunity, without regard for whether they are entitled to summary judgment for other reasons. *See id.* Having earlier persuaded this court to reverse and remand on their anti-SLAPP argument, without consideration of other reasons for a judgment in their favor, Nelson and Stroble cannot now argue that this court should consider those other reasons when ruling on Zutz and Elseth's constitutional challenge to the anti-SLAPP statute.

Thus, the district court erred by not ruling that the anti-SLAPP statute is unconstitutional as applied.

**C.**

We last consider whether, in light of the foregoing analysis and conclusions, Nelson and Stroble are entitled to an award of attorney fees and costs under the anti-SLAPP statute. At oral argument, Nelson and Stroble conceded that, if this court were to decide that the anti-SLAPP statute is unconstitutional as applied, there would be no statutory basis for the district court's award of attorney fees and costs. We agree. The applicable statute provides, "The court shall award a moving party who prevails in a motion under this chapter reasonable attorney fees and costs associated with the bringing of the motion." Minn. Stat. § 554.04, subd. 1. Because we have concluded that the anti-SLAPP statute is unconstitutional as applied to Zutz and Elseth's claims, Nelson and Stroble have not "prevail[ed] in a motion under" the anti-SLAPP statute. *See id.* Thus, Nelson and Stroble are not entitled to the attorney fees and costs associated with their anti-SLAPP motion. *See J.E.B. v. Danks*, 785 N.W.2d 741, 751 n.4 (Minn. 2010) (reversing defendant's statutory fee award due to reversal of grant of summary judgment).

In sum, we conclude that Zutz and Elseth did not waive their constitutional challenge to the anti-SLAPP statute, that the anti-SLAPP statute would violate Zutz and Elseth's constitutional right to a jury trial if they had claims that warranted a trial, and that Nelson and Stroble are not entitled to an award of attorney fees and costs under the anti-SLAPP statute. We hope that this opinion brings this long-pending lawsuit to a conclusion.

**Reversed.**